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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 19

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA; EX OFFICIO COMMISSIONER OF BANKING

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; AND PEOPLES BANK OF LAKELAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT S. EDWARDS
P. O. Box 1119
Plant City, Florida 33566
Attorney for Petitioner

Of Counsel:

ALSTON, MILLER & GAINES
1100 Connecticut Avenue
Washington, D. C. 20036

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The First National Bank in Plant City petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered September 12, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A to this petition (infra, pp. 1a-19a) is unreported. The opinion of the district court (App. A, *infra,* pp. 21a-31a) is reported at 274 F. Supp. 449.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1968 (App. A, *infra,* p. 20a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a national bank may be precluded by state law from engaging in activities which are authorized by provisions of the National Bank Act, 12 U.S.C. 21 et. seq., which do not specifically incorporate state law.

2. Whether activities of a national bank other than those described at 12 U.S.C. 36(f) may properly be considered branching within the meaning of the National Bank Act.

3. Whether, in construing 12 U.S.C. 36(c) a federal court may look to either the interpretation of a state official or the decision of a state court for a determination as to the meaning of the statute law of the state in question.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are 12 U.S.C. 36(c) and 36(f) and section 659.06(1)(a), Florida Statutes. They are printed in App. B., *infra,* pp. 35a-36a. The regulation involved is ¶ 7490 of the Comptroller of the Currency's Manual for National Banks (App. B., p. 36a).

STATEMENT

Petitioner, The First National Bank in Plant City (hereafter First National), is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, et seq., with its only office in Plant City, Florida. The dispute in this case arises out of an attempt by the Florida Banking Commissioner, on the basis of state law, to prohibit petitioner from engaging in an activity which is authorized to national banks by the National Bank Act.

Pursuant to ruling No. 7490[1] of the Comptroller of the Currency, who is the supervisor of national banks, First National began on October 3, 1966 to offer a messenger service to assist its customers in transporting cash and other items to and from the Bank for deposit or withdrawal. Briefly, the messenger service functions as follows.[2]

First National owns an armored car which is driven by an employee of the bank. Customers of the bank, primarily those operating commercial establishments, may contract with the bank for regular or occasional pick-up and delivery of funds. Customers using the service must enter into a "Comprehensive Dual control Contract" with the Bank which provides, among other things, that the Bank is acting as agent for the customer in transporting the money. In addition, transmittal slips, which provide that monies picked up by the messenger are not deemed to be deposited until

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[1] Comptroller's Manual for National Banks, § 7490, App. A, infra, p. 36a.

[2] The operations are described in more detail at pp. 396-440, 458-503 and 512-564 of the original record in the Court of Appeals (hereinafter designed as "R").

received by tellers at the banking house, accompany each pick-up. The Dual Control Contract and a "debit memo" provide that funds delivered to customers must have already been charged against their accounts before the delivery.

First National also maintains a concrete receptacle, similar to a night depository, in a local shopping center. Items for pick-up by the messenger may be placed in the receptacle together with the same form of transmittal slip used for direct pick-up.

Shortly before inauguration of its messenger service, First National received a letter from the Deputy Commissioner of Banking of the State of Florida [3] advising the Bank that the service was in violation of Section 659.06(1)(a), Florida Statutes [4] and threatening "legal proceedings" unless the Bank should "cease and desist" from the proposed operation.

In order to forestall the threatened "legal proceedings" and to remove the cloud which the State Commissioner had created with respect to the messenger service, First National, on October 7, 1966, brought this action against the Commissioner for declaratory judgment and injunctive relief in the United States District Court for the Northern District of Florida.

The complaint asked, *inter alia,* for declaratory judgment that First National was subject to the paramount federal law respecting national banks and that any state law or interpretation of state law must yield when in conflict with the federal declaration of national

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[3] The letter is reproduced at R. 2096.

[4] Section 659.06(1)(a), Florida Statutes is reproduced in Appendix A at p. 35a-36a.

bank powers. First National also asked the court to declare judgment that its messenger and receptacle services were not in violation of Section 659.06(1)(a), Florida Statutes. Finally, the complaint sought judgment that state officials have no authority to supervise national banks and requested an injunction to prevent the State Commissioner from further interfering in the operations of plaintiff's business.

Defendant's answer asserted that the Florida statute is made binding on First National by 12 U.S.C. 36(c) (App. B., p. 35a) and that the messenger service is also in violation of 12 U.S.C. 81.[5]

Following hearings on numerous motions and the intervention on the side of First National by the United States Comptroller of the Currency and by three state banks on the side of the State Commissioner, the District Court, on May 6, 1967, granted summary judgment for First National and the federal Comptroller "with respect to the issues raised concerning the application of 12 U.S.C. 36 and 12 U.S.C. 81" (App. A., p. 31a). In an accompanying Memorandum Decision (App. A., pp. 21a-31a) the District Judge ruled that the National Bank Act, at 12 U.S.C. 36(f),[6] contains an "exclusive definition" of the term "branch" and that

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[5] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

[6] (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

the activities performed through First National's messenger service do not constitute branching within the terms of that definition. The Court found further that the service in question was not "the general banking business" off premises in violation of 12 U.S.C. 81. With respect to the effect of Florida law in the matter, the Court held that "once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching."

Final judgment, incorporating the Order and memorandum of May 6, and disposing of several remaining points was entered June 2, 1967.

All defendants appealed and the Court of Appeals, following full briefing and oral argument, reversed the District Court on September 12, 1968.

The Court of Appeals' opinion dwelled almost entirely on what it described as the "meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres" (App. A., p. 1a). Relying primarily on its view of this Court's decision in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company,* 385 U.S. 252 (1966), and on a District Court opinion from the state of Washington,[7] the Circuit Court decided that "in this instance Florida law is operative and controlling" (App. A., p. 3a). The Court concluded its analysis by noting that the Florida statute in question did not deal specifically with the kind of service performed by First National but that the Court "should follow" the interpretation

[7] *State Chartered Banks in Washington* v. *Peoples National Bank of Washington,* W.D. Wash., 1966, No. 6338 (unpublished memorandum decision, R. 1839 et seq.).

thereof by the State Banking Commissioner (App. A., p. 18a). The Court thereupon remanded the case for entry of a conditional decree in the event "Florida law is ultimately determined to be different than here expounded" (App. A., p. 19a).[8]

REASONS FOR GRANTING THE WRIT

The Court of Appeals wrongly relied on state law rather than on the applicable federal law in passing on the legality of the operations of petitioner, a national bank. The effect of this decision will be to allow each state to prohibit any off-premises activity of a national bank simply by defining such activity as a branch even though the National Bank Act defines "branch" in different and conflicting terms.[9] Moreover, in arriving at its decision the Court depended heavily on what, we submit, is a distorted and erroneous extension of this Court's decision in the *Walker Bank* case, *supra*. Finally, the decision below is in direct conflict with decisions of the United States Courts of Appeals for the Distrcit of Columbia and the Third Circuits.

1. An Important Federal Question Is Involved

The Court of Appeals stated that "the controlling issue of law in this appeal concerns the district court's choice of law, i.e. that court's failure to consult state

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[8] A case raising the issue of the meaning of the Florida Statute is currently pending in a Florida State Court; *Dickinson* v. *The Tallahassee Bank and Trust Co.*, 2d Jud. Cir. Leon County No. 68-30.

[9] Within the last two months the Attorney Generals of Texas and Oklahoma have ruled that so-called "deposit machines" are illegal branches under the laws of those states.

law. . ." (App. A., p. 7a). The Circuit Court then decided the appeal on the basis of a state official's interpretation of Florida law. The decision thus ignored the principle, which has been established since the earliest judicial construction of the National Bank Act, that the powers of national banks are given and withheld only by federal legislation unless a specific deferral to state law is incorporated in a federal statute. This Court has repeatedly held, as it did in *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557, that national banks "are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit." See also *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896); *Easton* v. *Iowa*, 188 U.S. 220 (1903); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963).

The only exception to the preeminence of federal law with respect to the activities of national banks is where Congress has "by express language" made a particular phase of national banking subject to state restrictions. *Franklin National Bank* v. *New York*, 347 U.S. 373, 378 (1953). As the *Franklin* case makes clear, however, such exceptions must be specifically intended by Congress and are not to be implied where a conflict with federal law would result. The decision of the Court of Appeals violates this long standing system for the governance of national banks.

No federal statute directs reference to state laws in connection with a national bank's power to render services such as those involved here. It is clear from this Court's decision in *Merchants Bank* v. *State Bank*,

77 U.S. 604 (1870), and from opinions of the Attorney General of the United States, 29 Ops. Atty. Gen. 81,[10] that this kind of agency activity is authorized to national banks as an incident to their banking business pursuant to 12 U.S.C. 24 (seventh). These same authorities make it clear that the service in question was authorized to national banks long before they were given the right to operate branches in 1927 and 1933. Accordingly, there is, as the District Court held, no occasion for reference to the branching sections of the Act (12 U.S.C. 36(c)), in order to find authority for First National's messenger service.[11]

The Court of Appeals' decision to adopt state law in deciding what activities a national bank may conduct away from its premises will be profoundly disruptive of the operations of the nearly 5,000 national banks in the United States. In addition, to messenger services of various kinds, national banks conduct a wide variety of activities away from their main and branch offices. Highly significant functions such as data processing

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[10] Cited with approval in *First National Bank* v. *Missouri*, 263 U.S. 640, 658 and at n. 1, p. 658.

[11] Much of the briefing and most of the oral argument in the Court of Appeals was devoted to the question of whether First National's messenger operations constituted acceptance of deposits off the Bank's premises, thereby bringing the operation within the ambit of 12 U.S.C. 36(c). Appellees had cited numerous authorities making clear that deposit transactions are governed by contract. The contractual documents involved here specifically provided that the depositor-depositee relationship would not arise until the funds were actually received at the banking house. The District Court had determined that the messenger was not receiving deposits and apparently the Court of Appeals did not disagree inasmuch as the opinion is silent on this point.

and trust department facilities are frequently conducted at separate locations. The solicitation of new loan and deposit business is regularly engaged in throughout the country by virtually all of the major commercial banks. Correspondent services and credit card operations are unavoidably performed away from established bank branches. Loan and underwriting closings involving bank officers regularly occur off the bank's premises. Services of this kind are of increasing significance as bank operations grow more sophisticated and complex and bank customers more mobile and geographically dispersed.

It had always been clear, until the decision of the Court of Appeals in this case, that such off-premises services were authorized to national banks as part of their general powers under 12 U.S.C. 24 (seventh) and were subject to supervision only by the Comptroller of the Currency. The relatively complex procedures involved in procuring a branch certificate have been required, as the legislative scheme clearly intended, only in situations in which the bank proposed to perform one of the three fundamental banking operations which 12 U.S.C. 36(f) defines as branching: receiving deposits, paying checks or making loans away from the main office.

There are currently 14 states in which branching is totally prohibited and 21 more in which restrictions of various kinds are imposed on the right to branch. If the opinion of the Court of Appeals below were the law, state banking commissioners in these states could, at their discretion, determine that virtually any national bank activity performed off-premises was unlaw-

ful. In the remaining 15 states the State Commissioners could, in effect, require that national banks obtain branch certificates for each such activity. Such fears are not exaggerated. The Court of Appeals recognized that:

> "... national banks may well fear the authority of state comptrollers to make extreme use of the same defining process ..." (App. A., p. 18a)

But, while acknowledging this potential result of its opinion, the Court suggested only that national banks' "recourse must be to Congress" (App. A., p. 18a). A far more appropriate recourse is to this Court which petitioner now asks to restore the traditional limitations on state instusions into the national banking system.

2. Conflict With Walker Bank Decision

The primary justification offered by the Court below for applying state law to the question of which activities of a national bank may be performed by agents off-premises was this Court's decision in *Walker Bank, supra.* Referring to, what it calls, "the Court's overwhelming acceptance of the philosophy of 'competitive equality'", (App. A., p. 8a) the opinion below reasons that lower courts "must permit rays of state law to refract and reflect their statutory vision" (App. A., p. 10a) not just where state law is specifically adverted to in the federal statute but as a general method and judicial approach to determining the limits of national bank powers. Petitioner submits that such a holding extends the *Walker Bank* decision far beyond its intended reach and throws into confusion and

grave doubt many of the essential activities of national banks throughout the country.[12]

The question upon which this Court granted certiorari in *Walker Bank* was stated as follows:

> Whether, in authorizing the establishment of a branch office by a national bank, the Comptroller of the Currency is bound by a provision of State law that permits a State bank to establish a branch only through the acquisition of an existing bank.[13]

The question arose out of a dispute as to the scope of 12 U.S.C. 36 which provides "the conditions upon

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[12] The expansion of the *Walker Bank* opinion and the potential for disruption of national bank activities have been quickly recognized. In an October speech to the National Association of State Bank Supervisors, the Association's General Counsel said:

> Perhaps the most significant extension of the competitive equality doctrine of the Walker Bank case, however, came last month in the Dickinson decision of the Fifth Circuit. Many lower courts have held that the sole definition of a branch binding on the Comptroller is that contained in Section 36(f) of the National Bank Act. Not so, said the court. That is only a partial definition and then the Comptroller must look to state law by which he is bound . . .
>
> In other words, state branch definition, binding on national as well as state banks, may be made by the State Bank Supervisor, through interpretation or regulation, in the absence of a clear-cut statutory definition, or of an authoritative state court or Attorney General ruling. The Dickinson decision thus establishes state law as the standard for determining whether mobile offices, drive-in facilities, or, as I shall mention in a moment, loan production offices, are branches to be permitted, prohibited, or restricted by state law. Speech of James F. Bell, *American Banker*, November 12, 1968, p. 4, col. 2-3.

[13] This is the statement as set forth in the Government's petition in *First Security Bank* v. *Commercial Security Bank*, a companion case to *Walker Bank*. The government's petition in the *Walker* case adopted its petition in *Commercial Security*. The cases were decided by a joint opinion.

which a national banking association may retain or establish and operate a branch . . ." Section 36(c) declares that "New branches" may be approved only if "such establishment" would be authorized to State banks by the State's law. The national bank activity which provided the controversy in *Walker* was undeniably a branch. The bank had been issued a branch certificate and it was clearly intended that the branching functions set forth in the federal definition at 12 U.S.C. 36(f) would be performed. The only question before the Court, therefore, involved the degree to which state law was made applicable by Section 36(c) to an operation which was within the 36(f) definition of branch.

In its discussion of 12 U.S.C. 36 this Court in *Walker Bank* concentrated on the legislative history surrounding the question of whether national banks should be permitted to operate branches as such offices were generally known to operate and as they were subsequently defined at 12 U.S.C. 36(f). No references appear in the *Walker Bank* opinion to other phases of national bank operations and it is clear from the legislative history of 12 U.S.C. 36[14] that no other activities were

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[14] There is an extensive history of Congressional activity leading to enactment of the McFadden Act of 1927, 44 Stat. 1224 permitting national banks to branch in their home office cities and of the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162, containing the rest of the branching provisions now contained at 12 U.S.C. 36. Most of the debate centered on the dispute between branch banking as opposed to unit banking. Much of the rest of the legislative history is devoted to the need to strengthen the national banking system which was at a severe disadvantage by being statutorily precluded from branching. There is no indication in the history of these two acts that Congress thought there existed or intended to inaugurate a mirror-image equality between

intended to be affected by enactment of the McFadden and Glass-Steagall Acts. Accordingly, the *Walker Bank* opinion concluded its legislative analysis as follows:

> It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added)

The clear limitations inherent in the *Walker Bank* holding comport perfectly with the earlier suggestion in *Franklin National Bank* v. *New York, supra,* that Congress customarily employs express references to state law when it wishes to tie national bank powers to state policy.[15]

The implications for the national banking system of the Court of Appeals' vast extension of this Court's decision in *Walker Bank* are profound. It is of great importance that the long standing relationship between federal and state law in this area be considered by this Court and restored to its former balance.

3. Conflicts With Other Circuits

The opinion of the Court below is directly in conflict with decisions of the United States Court of Appeals for the District of Columbia and for the Third Circuit

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the two systems. Indeed, Congress has specifically imposed numerous limitations on national banks which are far stricter than state laws in the same areas. In Florida, for instance, state banks have significantly greater freedom with respect, *inter alia*, to lending limits, legal reserves, election of directors and pledging assets.

[15] At 347 U.S. 378, n. 7 the court listed four instances in which such express language appears in the National Bank Act.

and with earlier decisions of the Fifth Circuit Court itself.

In *Camden Trust Company* v. *Gidney,* 301 F.2d 521 (1962), cert. den. 369 U.S. 886 (1962) the District of Columbia Circuit considered a challenge to the granting of a new national bank charter by the Comptroller of the Currency. Plaintiff's contention was that the proposed new bank would "for all practical purposes constitute a branch facility" of another bank which had been instrumental in its formation. As a branch, the new facility would admittedly have been precluded from operating at its proposed location.

The Court of Appeals noted first that the section of the National Bank Act (12 U.S.C. 36) dealing with branching "is clear on its face and says, without ambiguity, exactly what it means." And that "(b)eyond peradventure, Congress even defined the term 'branch' ", 301 F.2d at 524.[16] The Court then decided that the new bank was clearly not a branch. Having decided that the activity in question was not a branch within the meaning of the 12 U.S.C. 36(f) definition the Court concluded that 12 U.S.C. 36 had "no applicability to the situation disclosed on the record" and that it was unnecessary to consider the effect of state law, which would become operative only to the extent that it was subsumed by 12 U.S.C. 36.[17]

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[16] The Court of Appeals here, on the other hand, finds that 12 U.S.C. 36(f) "is hardly adequate as a definition." (App. A, p. 17a)

[17] In *Whitney National Bank* v. *Bank of New Orleans & Trust Co.,* 323 F. 2d 290 (1963), rev'd. on other grounds, 379 U.S. 411. The District of Columbia Circuit approached 12 U.S.C. 36 in the same frame of reference. The Court in *Whitney,* unlike *Camden* found on the facts that the activity in question was a branch. But

The opinion of the District of Columbia Circuit in *Camden Trust* is precisely in accord with the decision of the District Court which was reversed by the Court of Appeals in the case at bar. The District Judge below was satisfied that deposits were not received, checks paid or money lent by First National's messenger. Accordingly, he found that 12 U.S.C. 36(c) had no applicability and there was no basis for looking to state law as a possible bar to the national bank activity in question. In reversing the District Court, the Court of Appeals created a direct conflict with the District of Columbia Circuit. In rejecting what it characterized as the *Camden Trust* court's "desire to adhere to federal law" (App. A., p. 9a) the opinion below specifically draws attention to this conflict.

In addition to the direct conflict with the D. C. Circuit, the opinion of Judge Goldberg in this case is in apparent conflict with earlier decisions of the Fifth Circuit itself. In *State of Texas* v. *National Bank of Commerce of San Antonio,* 290 F.2d 229 (1961) the same court refused to bring up state law branching restrictions through sec. 36(c) and apply them to an activity of a national bank which was authorized by other provisions of the National Bank Act. The Court reached this result even though the activity in question actually involved one or more of the branching functions enumerated at sec. 36(f).

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in so doing, the test applied was the sec. 36(f) definition through which, the Court noted, Congress had given "meaning to the word branch" (323 F. 2d at 301). A recent District Court case which treats sec. 36(f) as a definition of the term "branch" and ignores state law in assessing the nature of the off-premises facility involved is *Metropolitan National Bank of Farmington* v. *Camp,* 281 F. Supp. 238 (E.D. Mich. 1968).

In *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71, 72 (1965) the Fifth Circuit decided to apply state law to a proposed drive-in facility only after determining that it met the sec. 36(f) definition. Correctly reading sections 36(c) and 36(f) together the Court in *Jackson* stated the law as follows:

> Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office.

The Court of Appeals' opinion is additionally in error and, again, in conflict with other circuits in holding that the Florida Banking Commissioner's interpretation constitutes the kind of state law which may be incorporated into sec. 36(c), (assuming, as the Court of Appeals did, but as the District Court and petitioner deny, that section 36 is applicable here). In a related error the Court abdicated its own responsibility to construe the state law in such circumstances, by conditioning its decision on the outcome of a pending state court suit.

12 U.S.C. 36(c) refers to the "statute law of the state" and not to administrative interpretations of that law. Other courts have regularly held that regulations or interpretations of State Banking Commissioners are not to be considered in determining what the statute law of the state permits or prohibits with respect to national bank branches. *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718, 723, (D.C. Cir. 1964); *State* v. *National Bank of South Dakota*, 219 F. Supp. 842, 848-851 (D.S.D. 1963); aff'd. 335

F.2d 444 (8th Cir. 1964); *Leuthold* v. *Camp,* 273 F. Supp. 695 (D. Mont. 1967).

The opinion of the Court of Appeals is directly in conflict with the decision of the Third Circuit in *Howell* v. *Citizens First National Bank of Ridgewood,* 385 F.2d 528 (1967). In the *Howell* case the Court reversed the District Court's order staying the federal proceedings pending determination by a state court as to the proper application of state branching law to the case at hand. The Third Circuit held that the meaning of the New Jersey branch banking statute was "a purely federal question" for purposes of 12 U.S.C. 36(c) and that "abstention in favor of the state courts is not appropriate." 385 F.2d at 531. The decision of the Court of Appeals in this case is precisely contrary to the *Howell* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. EDWARDS
Attorney for Petitioner

Of Counsel:

ALSTON, MILLER & GAINES

November 25, 1968

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the attached petition with appendices to V. Carroll Webb, the Capitol, Tallahassee, Florida, attorney for Fred O. Dickinson, Jr., to William Reece Smith, Jr., Post Office Box 3239, Tampa, Florida 33601, attorney for the Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland and to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 with sufficient postage attached.

This 25th day of November, 1968.